

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Case No. 3:10-cr-522

Plaintiff,

vs.

THURSDAY, AUGUST 4, 2011

ALEX DAVID COOK,

Defendant.

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Gene Crawford and Thomas O. Secor,
Assistant United States Attorneys

For the Defendant: Donna M. Grill,
Assistant Federal Public Defender
and
Elizabeth Kelley, *Esquire*

Official Court Reporter: Sarah E. Nageotte, RDR, CRR, CBC
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 THURSDAY, AUGUST 4, 2011

2 - - -

3 (Proceedings commenced at 4:07 p.m.)

4 - - -

15:01:11 5 (All participants appearing telephonically)

6 - - -

7 JUDICIAL SECRETARY: Okay. We have, actually,
8 Sarah from Cleveland is the court reporter.

9 She's taking this.

16:07:18 10 THE COURT: Okay. Good.

11 Thank you.

12 JUDICIAL SECRETARY: Donna Grill, Elizabeth
13 Kelley, Tom Secor, and Gene Crawford are on the line.

14 THE COURT: Okay.

16:07:30 15 JUDICIAL SECRETARY: And Diane's here, too.

16 THE COURT: Good.

17 Okay. Okay. And I understand that there's an
18 appearance of new counsel; is that correct?

19 MS. KELLEY: That's correct, Your Honor.

16:07:47 20 I filed a notice of appearance on Monday and shortly
21 thereafter Donna filed her motion to withdraw.

22 THE COURT: But you know the trial day is set
23 in about four weeks?

24 MS. KELLEY: Yes. Yes. And I also filed, in
16:08:00 25 the wee hours of this morning, a motion to continue.

1 THE COURT: Well, what's going on?

2 I mean, the case has been set for trial and what's --
3 what's the Government's position and situation?

4 MR. SECOR: Your Honor, this case was
16:08:23 5 indicted --

6 THE COURT: Tom, recognize yourself for the
7 court reporter.

8 MR. SECOR: Sorry, Your Honor. Tom Secor.

9 This case was indicted, if I'm not mistaken, back in
16:08:31 10 December, and there's been ongoing discussions in an attempt
11 to resolve it. It was not resolvable.

12 We had a trial date in the end of June, which was
13 continued to September. On that June date, we had a motion
14 to suppress hearing, subsequently issued an order granting
16:09:00 15 and denying in part that particular motion. A couple
16 motions that have been filed have been resolved.

17 The case should take a day and a half to two days to
18 try at most. I know Ms. Grill has had several examinations
19 done concerning the case.

16:09:24 20 I just -- frankly, we've got witnesses coming from the
21 four corners of the country, and travel arrangements have
22 been made and, frankly, I think that four weeks is more than
23 enough time to get this case ready to go, even for someone
24 coming in from a standstill start.

16:09:44 25 THE COURT: Let me ask you this. I assume,

1 but I want to confirm, that -- well, let me ask you this.

2 To what extent is the entire, your entire file been
3 available to defense counsel?

4 MR. SECOR: It's been --

16:10:01 5 MS. GRILL: Your Honor, this is Donna.

6 And as always, the U.S. Attorney's Office has made
7 their file available to me. We have reviewed it. We've had
8 an expert also come in and review matters.

9 If I may, Your Honor, this is a very young man, very
16:10:23 10 big decision for his --

11 THE COURT REPORTER: I'm sorry. You're
12 breaking up.

13 THE COURT: Donna, it's a little hard to hear
14 you. I'm outside, too. I'm --

16:10:37 15 MS. GRILL: I'm sorry. I'm on speaker. I was
16 over at the U.S. Attorney's Office reviewing another file.

17 THE COURT: Okay.

18 MS. GRILL: Anyway, this is a very young man.
19 It's a very, very big decision.

16:10:53 20 THE COURT: Oh, of course.

21 MS. GRILL: He, nor his family, has ever dealt
22 with, you know, anything like this, dealt with the criminal
23 justice system.

24 I think, how I understand, obviously, he wanted
16:11:06 25 another opinion and wanted his -- his family wanted to

1 retain counsel on his behalf.

2 I know and assume that he didn't come into money this
3 week, so I don't know how an arrangement was made, but I
4 know his family has been very supportive and, you know, I
16:11:23 5 would just say that while I appreciate the U.S. Attorney's
6 concerns, and really I am technically off the case, and I
7 know that they have been, in all honesty, very patient --

8 THE COURT: Well, have I granted leave for you
9 to withdraw?

16:11:41 10 MS. GRILL: Not yet. Not yet.

11 THE COURT: Well, I don't have to do that.

12 MS. GRILL: This is true, Your Honor. You do
13 not have to do that.

14 THE COURT: And I assume that you would be
16:11:51 15 prepared to go to trial?

16 MS. GRILL: I would. I would be prepared,
17 yes. I -- there are a couple of in limine type motions that
18 I've already --

19 THE COURT: Sure. The usual.

16:12:03 20 MS. GRILL: Right. Exactly. That we had
21 filed. But other than trial type, there's no pretrial
22 matters left.

23 THE COURT: Yeah.

24 MS. GRILL: But I think when a situation
16:12:14 25 reaches a point where, you know, the client feels a need to

1 retain counsel, you know, that -- that's what he needs to
2 do.

3 And I am -- you know, I know Ms. Kelley is a very good
4 lawyer.

16:12:30 5 THE COURT: I know that. Sure.

6 MS. GRILL: I think it's in his best interest
7 to --

8 THE COURT: I mean --

9 MS. GRILL: -- have a little bit more time to
16:12:41 10 counsel with her.

11 THE COURT: Well, four weeks is four weeks.
12 It's not as though the case is set for a week from Monday or
13 whatever.

14 I mean, it's -- how many witnesses does the Government
16:12:56 15 presently expect to call?

16 MR. SECOR: Well, Your Honor, anywhere from
17 seven to nine, but half of those are chain of custody
18 witnesses.

19 THE COURT: Okay.

16:13:11 20 MS. GRILL: And, Your Honor, Mr. Secor and I
21 did have some preliminary discussions regarding potential
22 stipulations that, you know, just things that we thought
23 might move --

24 THE COURT: Sure. Of course.

16:13:26 25 MS. GRILL: -- a little bit quicker.

1 We haven't really come to any further discussion or
2 decision on that, but we have definitely had a lot of
3 ongoing discussions about this case.

4 THE COURT: Yeah. You know, and I -- I don't
16:13:40 5 want to put the defendant in a position that he feels he has
6 to plea, and that's not my concern, but my concern is that
7 when the Government indicates that, you know, it has made
8 arrangements to have a number of witnesses be present in
9 trial, you know, it's not a two or three witness case.

16:14:08 10 What is there -- Tom, let me ask you this. What if
11 the chain of custody -- in other words, the -- we'll call it
12 technical or procedural witnesses were not --

13 MS. KELLEY: Your Honor? Your Honor?

14 THE COURT: Yes.

16:14:24 15 MS. KELLEY: I'm going to have to absent
16 myself for a minute or so. I apologize.

17 I need to pay the cab driver and get my bag out of the
18 trunk.

19 THE COURT: Okay.

16:14:35 20 MS. KELLEY: I am so sorry. I am so sorry.

21 THE COURT: No. No. Go ahead. No problem.

22 MR. SECOR: Judge, the out-of-town
23 witnesses --

24 THE COURT: Tom, wait until she gets back.

16:14:43 25

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(Pause in proceedings)

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4

MS. KELLEY: Excuse me. I'm back for a

16:15:18 5

moment. That was a false alarm.

6

THE COURT: Oh, okay.

7

Well, let's -- I mean, Tom, if you had -- I assume

8

that you will, I can't imagine you guys are -- unless

9

there's some real reason to fuss about chain of custody, we

16:15:36 10

can do that by way of pretrial hearing, that's no big deal.

11

All right. Those witnesses, if it came to that, I

12

would suggest you guys, if there's really a chain of custody

13

issue or a foundation issue, that we can handle, that has

14

nothing to do with the jury.

16:15:54 15

MR. SECOR: Yeah. I'm just saying, you know,

16

even though there were seven or eight or nine witnesses,

17

whatever they are, most of them are chain of custody --

18

THE COURT: What -- what about the other --

19

let's assume for the moment that they're not a factor, okay,

16:16:11 20

that either you guys will stipulate or even, if necessary, I

21

could, you know, conduct those hearings by video conference,

22

if those are among the witnesses --

23

MR. SECOR: Then it's a four or five witness

24

case.

16:16:28 25

THE COURT: Pardon?

1 MR. SECOR: Then it's a four or five, six
2 witness case.

3 THE COURT: And how many of those witnesses
4 are out of town so far?

16:16:42 5 MR. SECOR: Four.

6 THE COURT: And where are they coming from?

7 MR. SECOR: One's from Oklahoma City. One is
8 from Washington.

9 MR. CRAWFORD: State.

16:16:59 10 MR. SECOR: Washington state.

11 THE COURT: And who are they? Who are these
12 witnesses? What's -- in a sentence or so, just tell me --

13 MR. SECOR: One will be a witness to identify
14 the -- one of the victims in one of the pictures.

16:17:13 15 One of them will be a witness who conducted the
16 undercover, when the defendant was distributing the stuff.

17 Of course, there is the Lima witness. No big deal.

18 And then there is a Time Warner witness. I think
19 they're from -- I'm not sure right now, I think it's out
16:17:45 20 west somewhere.

21 THE COURT: Yeah.

22 MR. SECOR: I need that witness to establish
23 an IP address, identity.

24 And there's another, possibly an expert from
16:18:00 25 Washington DC to explain how a particular program works.

1 THE COURT: Okay.

2 MR. SECOR: So, as you can see, it's not --
3 this isn't rocket science.

4 THE COURT: Yeah.

16:18:11 5 MS. KELLEY: And, Your Honor --

6 THE COURT: Elizabeth, if I may, since it's a
7 two-day trial, why can't you be ready in four weeks?

8 MS. KELLEY: Well, as a practical matter for
9 me, Your Honor, it's three weeks, and I realize you're going
16:18:27 10 to be telling me I should have calculated this before --
11 before meeting with the family.

12 But as I mentioned in an earlier conference call with
13 you earlier this week, my mother died a few weeks ago and I
14 had already arranged to go back up to Washington State to
16:18:46 15 spend a week. I'm an only child and there is -- there are
16 her estate matters to resolve, so I am absolutely committed
17 to doing that.

18 And so, it is -- it is three weeks of preparation for
19 me, not four. And although, in terms of time, this trial
16:19:06 20 might pass very quickly, it is -- there are a good deal of
21 documents. Donna Fed Ex'd me a large Fed Ex packing box
22 yesterday which constitutes her file, and as I also said in
23 my motion to continue, I may very well need to retain
24 additional experts based on -- based on my review of the
16:19:37 25 file.

1 So in order to be -- to be fully adequate -- in order
2 to be fully and adequately prepared, three weeks is not
3 enough. And again, the situation with someone in private
4 practice is you have a couple of other cases going on --

16:19:57 5 THE COURT: I understand.

6 MS. KELLEY: -- so --

7 THE COURT: I'm serious about this. It's a
8 totally different situation if it was, you know, local FBI
9 agents and cooperating witnesses and so forth and so on.

16:20:22 10 But these don't sound to me to be ordinary --

11 MS. KELLEY: It's -- it's not as --

12 THE COURT: Wait a minute. Wait a minute.
13 Listen to me.

14 MS. KELLEY: Sure.

16:20:34 15 THE COURT: The client, for whatever reasons,
16 he made a choice four weeks before trial, where, you know,
17 he would simply assume that the case would get continued,
18 and the Government, somewhat uncharacteristically, is
19 objecting to that.

16:20:48 20 And I'm sure you know the U.S. Attorney's Office here
21 well enough, they're not doing that just because they're
22 trying to jam you up or whatever, but in fact it is a
23 significant inconvenience to them to be told, well, not
24 quite so fast, I've decided to change lawyers at the
16:21:09 25 eleventh hour.

1 And I don't think -- I'm sorry. I don't think I have
2 to grant the continuance. I really don't.

3 Hold on a minute. I've got a call on another phone.
4 One second, please.

16:21:22

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(Pause in Proceedings)

7

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8

THE COURT: Sorry about that.

9

MS. KELLEY: That's all right. Your Honor --

16:22:14 10

10

THE COURT: Just -- you know, this has been

11

pending for eight or nine months, the case was set and it

12

was continued once, and I'm going to be very blunt, the

13

defendant doesn't get an opportunity to set my trial

14

schedule. He's given a trial date, he makes the decision,

16:22:35 15

15

and he's made a decision, and that's fine.

16

And this is the first I've heard about it. There's no

17

indication about dissatisfaction with the representation

18

he's got from the Federal Public Defender.

19

And what I'm inclined to do would be to -- I could

16:22:56 20

20

make arrangements for you back in the office on Monday and

21

have the hearing and come in and tell me, well, how come,

22

you know --

23

MS. KELLEY: You mean, there would be another

24

hearing on Monday?

16:23:07 25

25

THE COURT: I set this -- well, you're not

1 available now.

2 MS. KELLEY: No. I won't -- I will not be
3 back in Ohio until the 15th.

4 THE COURT: Okay. So you're outside of the
16:23:21 5 office?

6 MS. KELLEY: Yeah. I have to go up to
7 Washington and resolve some of my parents' affairs.

8 THE COURT: I understand. And what --

9 MS. KELLEY: And I will be out for the entire
16:23:32 10 week.

11 THE COURT: Okay. What -- and what is it --
12 the trial date is the 6th of September?

13 MR. SECOR: Correct, Your Honor.

14 MS. KELLEY: The trial, yes.

16:23:43 15 THE COURT: Okay. I'm just -- you know, as
16 far -- as far as I can recall, this is the first time the
17 Government has ever objected to a continuance of a trial
18 date, and I just don't see the justification to the
19 lawyer -- for the defendant to decide to change lawyers.

16:24:14 20 If he has --

21 MS. KELLEY: Your Honor, if -- if Donna --

22 THE COURT: Pardon me?

23 If he had the money, he should have -- if he was going
24 to -- if he didn't want a public defender, he should have --
16:24:25 25 his family should have gotten the money to retain counsel at

1 the outset of the case. The case has been pending for a
2 long time. There was a trial date set in June. It was
3 continued, I assume, because of the need to take the time to
4 get ready for trial.

16:24:39 5 I'm sure that Donna is ready or can be ready for
6 trial, and I don't have to grant the motion for leave to
7 withdraw unless there's some -- certainly without showing of
8 some cause that justifies changing the schedule, and as far
9 as I'm aware, there's been none.

16:24:59 10 Donna, have you had expressions of dissatisfaction?
11 Were you aware that your client was contemplating this? Or
12 did you simply -- you were simply notified that he wants to
13 change lawyers?

14 MS. GRILL: Your Honor, we met, and I don't
16:25:17 15 have a date book out in front of me, I'm going to say
16 recently, and --

17 THE COURT: A week or two ago?

18 MS. GRILL: Yeah. And there is -- there is a
19 difference of opinion of how to proceed.

16:25:34 20 THE COURT: Yeah. And if your client tells
21 you to go to trial, you go to trial.

22 MS. GRILL: This is true. That is absolutely
23 my job.

24 THE COURT: That is clear. Yeah.

16:25:45 25 MS. GRILL: And he contacted me whatever the

1 day before, I believe, Ms. Kelley filed her entry of
2 appearance.

3 THE COURT: Yeah.

4 MS. GRILL: But I can tell the Court that, you
16:25:57 5 know, it's certainly clear to me at this point that he, you
6 know, does not want our office on this case any longer.

7 And, you know, I'm not trying to beat a dead horse
8 here, but, I mean, he's 20 years old and this has just been
9 extremely difficult for him, and I can't even begin to
16:26:32 10 imagine, equally difficult I'm certain for his family.

11 And, you know, if -- if this is the avenue that is
12 going to help him, you know, resolve this in whatever
13 fashion he is most comfortable with and best for him, you
14 know, I believe that that is in his best interest.

16:27:05 15 THE COURT: Well, I really do not want to
16 grant this request without having spoken to him. I'm sorry.
17 I just -- I'm not happy with it.

18 And I don't think any defendant has a right to say at
19 the last minute, gee -- if he's lost confidence in you, if
16:27:35 20 he's -- you know, if you declined to do things he asked you
21 to do, that's one thing, if there's been a true breakdown in
22 communications.

23 But at the very least I think I owe it to the
24 Government to look him in the eye and say, look, you do
16:27:50 25 understand that Ms. Grill is fully willing and able to go to

1 trial on your behalf, a thoroughly competent and experienced
2 attorney, and if that's your concern, I can assure you
3 she'll proceed. You'll get first-rate quality
4 representation and that's fine.

16:28:12 5 And aside from whatever strictures the -- any
6 mandatory provisions the guidelines impose upon me, and of
7 course the loss of acceptance of responsibility, I'm not
8 going to impose a trial tax on him. It truly doesn't really
9 matter to me one way or the other at all whether he goes to
16:28:34 10 trial or not. And I can understand that.

11 So I -- can you be available by phone some time next
12 week?

13 MS. KELLEY: I certainly could be. I
14 certainly could be.

16:28:49 15 Your Honor, if I could expand a bit?

16 THE COURT: Sure. Go ahead.

17 MS. KELLEY: I -- I was somewhat terse in my
18 motion to continue and I didn't -- I didn't state --

19 THE COURT: You didn't expect -- you didn't
16:29:04 20 expect this reaction. You figured Judge Carr is Judge Carr,
21 he'll go ahead and continue it.

22 MS. KELLEY: Oh, no. No. No. I wasn't
23 intimating that you were a pushover by any means.

24 THE COURT: No. No. Wait a minute.

16:29:17 25 MS. KELLEY: If you were --

1 THE COURT: No. No. Wait. Wait.

2 I'm not suggesting -- I'm just saying that you could
3 have reasonably anticipated that there wouldn't have been a
4 problem.

16:29:26 5 MS. KELLEY: Because I've never heard the
6 Government oppose a motion like this.

7 THE COURT: Sure.

8 MS. KELLEY: But beyond that, as Donna said,
9 this is a very young, and not terribly sophisticated, young
16:29:38 10 man who comes from a not very sophisticated family.

11 THE COURT: Right.

12 MS. KELLEY: When I met with them, I gave them
13 a very expanded preamble as to what a good attorney Donna
14 was.

16:29:55 15 THE COURT: Absolutely.

16 MS. KELLEY: And what wonderful resources the
17 Public Defender's Office had at their disposal.

18 Nonetheless, this family, for whatever the reason,
19 doesn't feel comfortable with Donna. There is a breakdown
16:30:08 20 in communications.

21 And I -- as much as we all respect Donna, this family,
22 and it is a family, this family does not feel comfortable
23 going forward with Donna, and they did not quite know what
24 the etiquette was, if you will, basically rejecting a public
16:30:35 25 defender and reaching out for private counsel.

1 And they spent a bit of time behind the scenes doing
2 due diligence as to how to retain a private attorney and who
3 should that be, and that's been in the works for a number of
4 weeks.

16:30:54 5 So I wouldn't necessarily characterize this as an
6 eleventh-hour decision. It's more like an 8:45 decision.

7 THE COURT: Yeah. But it still comes at the
8 eleventh hour, whenever it was finally made, one way or the
9 other.

16:31:13 10 MR. SECOR: Your Honor, if I could help
11 anything here, I could make my entire file available, and it
12 wouldn't take -- it wouldn't take her more than a couple
13 hours to review the entire thing.

14 The only thing that might take any time is viewing
16:31:28 15 the pornography itself and that is in Toledo and could be
16 done in the same time she reviews the file and it would take
17 her all of half an hour or less.

18 MS. KELLEY: And in the meantime, I have
19 briefly reviewed one forensic report and I feel very
16:31:51 20 strongly that a more comprehensive report needs to be done,
21 so that means I need to retain an expert and his report
22 needs to be drafted, and that's -- that in itself is going
23 to take more than four weeks.

24 THE COURT: Joyce, are you on the phone?

16:32:15 25 JUDICIAL SECRETARY: Yes, Judge.

1 THE COURT: What else do I have that week? I
2 should have asked that first. Only civil cases, I'm sure.

3 JUDICIAL SECRETARY: There's one civil case.
4 It's a personal injury.

16:32:35 5 THE COURT: Yeah.

6 Okay. Have you retained that expert or contacted that
7 expert?

8 MS. KELLEY: I can pick --

9 THE COURT: Do you know who it is?

16:32:47 10 MS. KELLEY: Not at this point, no, but I plan
11 to do it forthwith.

12 THE COURT: What else do you have to do, aside
13 from your, you know, the demands of your family situation?

14 MS. KELLEY: I'll be back on the 15th and I
16:33:19 15 suppose I could cancel other cases and go from there and
16 hope that my -- my computer forensic expert can crank out a
17 report by the 6th, and if he can be in -- if he can testify,
18 if need be.

19 THE COURT: What kind of expert are we
16:33:44 20 talking? Does the Government have an expert? Let me ask
21 that. What's --

22 MR. SECOR: We have a guy, an individual who
23 did the, what we call the FTK report, which is the analysis
24 of the hard drive in the computer. I don't know if you
16:34:02 25 really call him an expert.

1 We have another individual who may testify that would
2 explain how this particular program works. I don't know if
3 you call him an expert either.

4 THE COURT: But, I mean, is this in terms of
16:34:32 5 telling the number of images there are? I just -- I never
6 tried one of these cases.

7 MR. SECOR: Neither have I, Judge. We're
8 going to learn this together.

9 Special agent -- or CFO Morford will testify as to
16:34:48 10 what's on the hard drive.

11 THE COURT: Okay.

12 MR. SECOR: And there's another bureau person
13 who will testify what he did in accepting the information
14 from the defendant when the defendant put this information
16:35:07 15 out for dissemination.

16 THE COURT: Okay.

17 MR. SECOR: And then there's also an
18 individual from the bureau who can testify to, as I
19 indicated earlier, how this program processes the
16:35:21 20 information.

21 THE COURT: Well, I'm not going to continue
22 the trial date.

23 Donna, I'll grant the motion to withdraw.

24 Elizabeth, I honestly think you have ample -- adequate
16:35:34 25 time, not ample time, but adequate time to get prepared, and

1 I'm just not going to do it.

2 It's -- the case has been set. I understand the
3 defendant's situation, but it's not that different from the
4 situation of other defendants faced with extremely difficult
16:36:00 5 choices, especially given the rigor of the guidelines from
6 what Congress and the Sentencing Commission have done in
7 these cases, which is devastating, and I've got my own views
8 on the utility and fairness of what faces a defendant in
9 terms of sentencing in these cases.

16:36:26 10 And ultimately, though, I think that given the fact
11 that the Government has prepared and been prepared to go to
12 trial, and -- I'm not going to -- I'm not going to change
13 the trial date. And I note your objection.

14 I would suggest that if you are unable to get an
16:36:45 15 expert, if that expert indicates that he or she is not --
16 experts, singular or plural -- for whatever reason they
17 can't be ready in four weeks, three weeks or two weeks,
18 whenever it is you're able to make arrangements with them,
19 make a record in that regard and we'll go from there.

16:37:05 20 MS. KELLEY: All right. And --

21 THE COURT: Okay. Go ahead.

22 MS. KELLEY: And --

23 THE COURT: And I -- let me -- let me also
24 say, to the extent that I may be committing an error in this
16:37:20 25 regard, you know, I have no problem with you making that

1 sort of record, and saying, look, Judge, you're taking
2 whatever shield I have out of my hands.

3 But at this point, we just don't know. If you don't
4 have an expert -- when you contact him, we don't know
16:37:38 5 whether that person can do the work that's necessary to
6 respond to the Government's proof. We -- I'm just very
7 reluctant to vacate the day on the basis that there may be
8 an expert out there whom you may want to use.

9 MS. KELLEY: Well, I know the expert I am
16:38:00 10 going to use. I just haven't picked up a phone yet and
11 called him.

12 THE COURT: I understand. Well --

13 MR. SECOR: Just so the record is clear, Your
14 Honor, I would like the record to reflect that when Donna
16:38:11 15 had this case, she sent a computer expert over to our bureau
16 and our bureau person allowed that expert to have access to
17 the hard drive for hours and hours and hours.

18 Now, whether there was a report prepared, I don't
19 know. My guess is there was. But an expert has had an
16:38:40 20 opportunity to spend --

21 THE COURT: Okay.

22 MR. SECOR: -- hours and hours and hours with
23 this hard drive.

24 THE COURT: Okay. All right. Well, I'm --
16:38:50 25 I'll grant Donna's motion to withdraw.

1 And I'll see you guys on the 6th of September.

2 MS. KELLEY: Now, Your Honor, one --

3 THE COURT: Yeah. Go ahead.

4 MS. KELLEY: And --

16:39:01 5 THE COURT: Go ahead.

6 MS. KELLEY: Am I to assume that the calendar
7 for proposed voir dire and jury instructions remains in
8 place?

9 THE COURT: Yeah. And don't -- in terms of
16:39:14 10 the voir dire -- yeah, I mean, that would be the same. I'm
11 more than -- I can postpone it a week.

12 Are there going to be any motions in limine? The main
13 thing I worry about is motions in limine that require some
14 kind of work on my part in terms of research, so that I try
16:39:37 15 to get those resolved before we actually start trial so you
16 know where you stand with the evidence.

17 On the jury instructions, I assume there's some
18 boilerplate out there, in talking about the substantive, you
19 know, not all the stuff about what evidence is and what
16:39:52 20 jurors do, but basically the elements of the charge and that
21 the --

22 MS. KELLEY: And -- and I apologize. I don't
23 have the docket in front of me.

24 THE COURT: Yeah.

16:40:02 25 MS. KELLEY: But as I recall, that -- the

1 proposed voir dire is due on the 15th, and that is an
2 absolute impossibility for me.

3 THE COURT: Yeah. Let's -- let's postpone
4 that by about -- that we can do -- you know, if you can get
16:40:21 5 that to me on the 22nd.

6 And if you guys can talk with each other, by proposed
7 voir dire, you mean the questions to be propounded to the
8 jury and the written questionnaire?

9 MS. KELLEY: Right.

16:40:33 10 THE COURT: Yeah. That's -- and I will go
11 ahead and conduct the voir dire, assuming I'm available and
12 able to do so, I'm glad to do that, which will probably take
13 at least a day, perhaps longer.

14 It might take longer because what I would propose in
16:40:50 15 this case would be individual voir dire. It's the kind of
16 case that it seems to me -- Tom, in terms of your schedule,
17 I assume you weren't anticipating something of that sort,
18 correct? I assume --

19 MR. SECOR: I can't imagine this voir dire
16:41:10 20 taking more than a day.

21 THE COURT: Okay. Yeah. That's fine. We'll
22 do it in a day. We'll do it on -- we'll do that on the 6th
23 and start taking evidence on the 7th.

24 When I get back on Monday, Monday or Tuesday, I'll
16:41:27 25 talk about the -- the civil case.

1 JUDICIAL SECRETARY: Okay. Because that looks
2 like it's going.

3 THE COURT: Yeah. Which one is that?

4 JUDICIAL SECRETARY: It is *Brudecki versus*
16:41:44 5 *Kukowski*. It's -- I had it up.

6 THE COURT: Okay. Whatever. We'll --

7 JUDICIAL SECRETARY: It's a personal injury.

8 THE COURT: Yeah.

9 JUDICIAL SECRETARY: And --

16:41:56 10 THE COURT: Okay.

11 JUDICIAL SECRETARY: Okay.

12 THE COURT: I'll take care of that. I'll get
13 it tried or postpone it a little bit, just back it up to
14 this.

16:42:07 15 JUDICIAL SECRETARY: Okay.

16 THE COURT: Okay. Anything further?

17 JUDICIAL SECRETARY: I was just looking --
18 okay. Yeah. No, I don't.

19 THE COURT: Okay. Anything further from the
16:42:15 20 attorneys?

21 MS. GRILL: No, Your Honor.

22 MS. KELLEY: No, Your Honor.

23 MR. SECOR: No.

24 THE COURT: Okay. And I'll make a change of
16:42:25 25 plea date also the, let's say, the 25th.

1 And by that, Elizabeth, I mean, after that, basically,
2 I expect, if he's going to plea, he will have done so on or
3 before the 25th. If the not, we will go to trial.

4 Okay.

16:42:48 5 MS. KELLEY: Tom, could you e-mail me a copy
6 of the proposed plea agreement?

7 MR. SECOR: We never had a proposed plea
8 agreement.

9 MS. KELLEY: Okay.

16:42:57 10 THE COURT: And, Donna, I assume that included
11 in the stuff if there was an expert report or whatever,
12 notes or whatever, you'll send Elizabeth everything that you
13 collected and put together?

14 MS. GRILL: Yes, Your Honor. She has what I
16:43:13 15 have.

16 THE COURT: Good.

17 MS. GRILL: With the exception of a few
18 letters that were sent to the client, which I can forward
19 those.

16:43:20 20 But, yeah, as far as anything of any substance, I got
21 that out immediately.

22 THE COURT: And, Tom, your experts' reports or
23 reports or at least information about their opinions has or
24 will be made available to Elizabeth?

16:43:34 25 MR. SECOR: Absolutely.

1 THE COURT: Okay, folks. Thank you.

2 JUDICIAL SECRETARY: Judge?

3 THE COURT: Yes, Joyce.

4 JUDICIAL SECRETARY: Just one thing, Monday is

16:43:42 5 Labor Day. So then Tuesday will be jury impanelment,

6 Wednesday the trial starts then?

7 THE COURT: Right. Yeah. And --

8 JUDICIAL SECRETARY: Okay.

9 THE COURT: And I'll plan to handle the

16:43:53 10 impanelment on Monday -- on the day after Labor Day.

11 MR. SECOR: Your Honor?

12 THE COURT: Yes, Tom.

13 MR. SECOR: Tom.

14 THE COURT: Go ahead.

16:43:58 15 MR. SECOR: Generally we get the juror

16 questionnaires the day before.

17 Is there a chance that the Court would request that

18 the Clerk's Office make them available on Thursday or Friday

19 before the weekend?

16:44:09 20 THE COURT: Yeah. We'll do what we can in

21 that regard.

22 MR. SECOR: Great.

23 THE COURT: Okay. See what you guys can do

24 about putting an agreed questionnaire together, and if you

16:44:21 25 can't, I'll sit down on the night of the 22nd and put one

1 together and get it in the Clerk's hands.

2 And, Joyce and Diane, if you have anything, make sure
3 I take care of that.

4 JUDICIAL SECRETARY: Okay.

16:44:33 5 THE COURT: So whatever we have in that regard
6 should be in the Jury Commissioner's hands by the 23rd, and
7 that ought to be enough time to get them out and back, I'm
8 not sure that it will be, but we'll do what we can.

9 So what, 60 persons? 12 persons? Two alternates? In
16:44:55 10 terms -- given the nature of the case, that ought to be an
11 adequate venire, wouldn't it?

12 MR. SECOR: Yeah. I would think.

13 THE COURT: Well, there's ten and
14 six peremptories? It's been so long since I've tried a
16:45:09 15 criminal case, I can't even remember that.

16 MR. SECOR: Ten and four I think.

17 THE COURT: Ten for the defendant and four for
18 the Government?

19 MR. SECOR: I think so. I'll have to look up
16:45:15 20 the rule.

21 THE COURT: Yeah. It will be 26 or 28.

22 Joyce, tell Annie I think we'll want 60 jurors.

23 JUDICIAL SECRETARY: 60?

24 THE COURT: Yeah.

16:45:24 25 JUDICIAL SECRETARY: Okay.

1 THE COURT: I've got a hunch that we're going
2 to have a number of people who, when they hear the subject
3 matter of the case, they're going to be disqualified for
4 cause or -- and I would like to have enough of a backup that
16:45:39 5 we don't run out of jurors.

6 JUDICIAL SECRETARY: Okay. Now, the juror
7 questionnaires, you want those the Friday before trial?

8 THE COURT: No. No. On the 22nd, counsel is
9 either to give me an agreed-to questionnaire or their
16:45:58 10 separate versions of the questionnaires, and I'll look at
11 them and make my mind up with regard to whatever has to be
12 done in that regard, and that will be in Annie's hands on
13 the 23rd.

14 JUDICIAL SECRETARY: Okay.

16:46:11 15 THE COURT: If you guys can send them in
16 electronic version, please, so I can cut and paste, unless
17 you have an agreed questionnaire.

18 Okay. Any -- any other questions, Tom?

19 MR. SECOR: None, Your Honor.

16:46:23 20 THE COURT: Elizabeth?

21 MS. KELLEY: None, Your Honor.

22 THE COURT: Okay. Thank you, folks.

23 - - -

24 (Proceedings concluded at 4:46 p.m.)

25 - - -

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

<u>/s/ Sarah E. Nageotte</u>	<u>2/21/2012</u>
SARAH E. NAGEOTTE, RDR, CRR, CBC	DATE